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# Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina - the Model, the Study, and the Implications

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# THE SUPREME COURT AND THE STATES: AN INQUIRY INTO MAPP V. OHIO IN NORTH CAROLINA. THE MODEL, THE STUDY AND THE IMPLICATIONS

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Faced with the necessity of deciding whether to impose an exclusionary rule on the several states as a constitutional requirement, the Supreme Court's initial response was one of vacillation which gave rise to sharp, often acrimonious, debate, both on and off the Court. In retrospect, the manner in which the matter was confronted resembles an attempt to construct a road without a preliminary blueprint. The objective can be attained, but at the cost of frequent diversions, inconsistencies and confusion. The existence of a separate, often parallel, and occasionally overlapping system at the state level provided the main source of complication. There was a natural tendency to accommodate to the state system, and thereby minimize the significance of the federal principle. However, with one bold stroke, the Court, in *Mapp v. Ohio*,[1] imposed the exclusionary rule as a constitutional requirement upon the states. There is little profit in an extensive re-examination of the "storm of constitutional controversy"[2] which raged from the initial decision in *Wolf v. Colorado*[3] to that in *Mapp*. Suffice it to say that while the debate is as vigorous as ever, there is little reason to believe that the Court will move back from its current position.[4] Thus the thrust of the current debate

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[1] 367 U.S. 643 (1961).

[2] *Id.* at 670.

[3] 338 U.S. 25 (1949).

[4] In Linkletter v. Walker, 381 U.S. 618 (1965), the Court ruled that the Mapp holding would not be given retrospective effect. While marking a withdrawal from the high-water mark of the Mapp decision, it is doubtful whether it indicates any trend of movement away from the exclusionary

is on the wisdom and practicability of the *Mapp* decision. The issues are basically the same, but the level has moved from the high ground of the Constitution to the plains of practical enforcement and efficacy, and the advisability of the exclusionary rule as applied to the states. Therefore, it is well to remember that it was in *Wolf v. Colorado* that the Court first held that:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.[5]

Accordingly, the Court, speaking through Mr. Justice Frankfurter, laid down as an express prohibition on the states any sanctioning of "such police incursion into privacy"[6] as violative of the due process clause of the fourteenth amendment. However, this negative admonition apart, Frankfurter was reluctant to impose any specific restrictions on the states. In seeking to distinguish the right from its enforcement, the Court expressed itself as desiring to give recognition to the "contrariety of views of the States"[7] which was viewed as supporting the proposition that the problem was "an issue as to which men with complete devotion to the protection of the right of privacy might give different answers."[8] For these reasons, the states were left free to devise remedies, in the light of their peculiar histories, institutions and needs:

> How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.[9]

The crisis for this line of reasoning came in *Irvine v. California.*[10]

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rule. See Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 VA. L. REV. 201 (1965); Mishkin, *The Supreme Court, 1964 Term—Forward,* 79 HARV. L. REV. 56 (1965); Note, *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 YALE L.J. 907 (1962).

[5] Frankfurter, J. in Wolf v. Colorado, 338 U.S. 25, 27 (1949).

[6] *Id.* at 28.

[7] *Id.* at 29.

[8] *Id.* at 28-29.

[9] *Id.* at 28.

[10] 347 U.S. 128 (1954).

In the words of Professor Allen, "The *Irvine* case is of critical importance in the history of the *Wolf* doctrine. It expressed the most stringent view of the limitations on federal judicial power associated with the doctrine. At the same time, it probably contributed more to the ultimate downfall of *Wolf* than any other holding of the Court."[11] In the course of their investigation of defendant for gambling violations, the police planted microphones in various parts of his home, eavesdropping on his and his family's conversations for over a month. At the trial, these conversations were testified to, and their admissibility was affirmed by a divided court. The majority felt constained by *Wolf* to reach this result, despite the feelings of outrage and indignation aroused by the conduct of the police. "That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted."[12] Surprisingly, the shaper of the *Wolf* rule, Justice Frankfurter, dissented. In so doing, he was forced to deal with his own creation in terms satisfactory to the rest of the Court. His attempt to do so was two-pronged. First, there was the argument that the *Wolf* holding was no more than a rejection of the implications of the question asked of the Court:

> Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourteenth Amendment as applied in Weeks v. United States, 232 U.S. 383?[13]

What was worrisome to Justice Frankfurter in *Wolf* were the absolute terms in which the question was propounded to the Court for answer. He affirmed his view of the due process clause, which in his eyes was implicit in the *Wolf* holding: "Thus, *Wolf* did not change prior applications of the requirements of due process, whereby this Court considered the whole course of events by which a conviction

[11] Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, in 1961 SUP. CT. REV. 1, 7 [hereinafter cited as Allen]. This essay has been reprinted in THE SUPREME COURT AND THE CONSTITUTION 75, 81 (Kurland ed. 1965).

[12] Irvine v. California, 347 U.S. 128, 132 (1954).

[13] *Id.* at 144.

was obtained and was not restricted to consideration of the trustworthiness of the evidence."[14]

At this stage, the second line of the argument was introduced. In *Rochin v. California*[15] the Court had ruled that use of a "stomach pump" to recover possession of two morphine capsules swallowed by defendant when the police entered his room was violative of the due process clause. For Frankfurter, the lesson to be learned from *Rochin* was that due process was violated, not when there was an element of unreasonable search and seizure by itself but rather, that "what is decisive here, as in Rochin, is additional aggravating conduct which the Court finds repulsive."[16] After outlining the conduct of the police in their investigation in *Irvine,* Frankfurter was forced to concede that "There was lacking here physical violence, even to the restricted extent employed in *Rochin.*"[17] How then, was there "aggravating conduct" present? This was present in the police conduct, which "here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month." This amounted to "a more powerful and offensive control over the Irvines' life than a single limited physical trespass."[18] From this, it is not clear whether the argument is that the police in *Irvine* were as bad or worse than those in *Rochin.* If the conduct of the police in *Rochin* was offensive to prevailing notions of "fairness" could it be possible to be *more* offensive in this case? Especially as such a finding is not necessary? Frankfurter did not convince the rest of his colleagues on this point. Even if the *Irvine* case was merely an example of offensiveness equal to that in *Rochin,* why was the conduct of the police in *Wolf* not equally repugnant to civilized standards of behavior? Mr. Justice Jackson thought it was: "Actually the search [in *Wolf*] was offensive to the law in the same respect, if not the same degree, as here."[19] Hence, the need for Frankfurter to assert that the conduct in *Irvine* went beyond that in *Rochin.* However, this left him exposed to the comment of Jackson that:

> The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal

[14] *Ibid.*
[15] 342 U.S. 165 (1952).
[16] Irvine v. California, 347 U.S. 128, 144-45 (1954) (dissent).
[17] *Id.* at 145.
[18] *Ibid.*
[19] *Id.* at 133 (majority).

> for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to *Wolf* as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.[20]

Ultimately, the obstacle which Frankfurter could not surmount was his own explication of a dichotomy between right and remedy in *Wolf*. This either stood, or it did not—to do otherwise would be "inconstant and inconsistent." The impact of the *Irvine* decision on the state courts has been described by Judge Traynor as follows:

> The many states that failed even to re-examine their evidentiary rules merely postponed the day of reckoning. They had clear warning in *Irvine* that if they defaulted and there were no demonstrably effective deterrents to unreasonable searches and seizures in lieu of the exclusionary rule, the Supreme Court might yet decide that they had not complied with "minimal standards" of due process.[21]

With deference, it is hard to find any such indications in the majority opinion. Jackson, dealing with the exclusionary rule, dismissed it in a somewhat terse paragraph.

> What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. The rule was announced in 1914 in *Weeks v. United States,* 232 U.S. 383. The extent to which the practice was curtailed, if at all, is doubtful. The lower federal courts, and even this court, have repeatedly been constrained to enforce the rule after its violation. There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it.[22]

However, by the end of the 1950's the trend began to reverse itself. In *Elkins v. United States,*[23] the Court struck down the "silver platter" doctrine by ruling that evidence wrongly seized by state officers was no longer admissible in a federal prosecution. And, in 1961, came *Mapp v. Ohio.*[24] Traynor's words describe the trend of

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[20] *Id.* at 134.

[21] Trayner, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, 324.

[22] Irvine v. California, 347 U.S. 128, 135-36 (1954). See note 38 *infra.*

[23] 364 U.S. 206 (1960).

[24] 367 U.S. 643 (1961).

authority graphically and accurately, "When in 1961 . . . [the Courts] so decided in *Mapp v. Ohio* and made the exclusionary rule mandatory in all States, it could hardly have taken anyone by surprise. For all their distracting discordantly nay-saying chimes, the hours had been successively striking that the zero-hour was coming."[25]

While the decision has been sharply criticised, *Mapp* has many sympathizers, and has been praised as a noteworthy step forward in the maintenance and safeguarding of the guarantees of the fourth and fourteenth amendments. The debate has not taken place in isolation, but within the context of the larger picture of the Court's work since 1961. The polarities have become sharp and distinct, and it seems at times that the debate is focussed less on persuading the opposition than on seeking to obtain the moral support of "public opinion," thereby circumventing the need for argument. In 1964 Professor Herbert Packer suggested a theoretical construct for analyzing the debate in order to provide some perspective and to more clearly appraise the movement of court decisions. Packer proposed two models, which he labelled the Due Process and Law Enforcement Models, as paradigms of the opposing positions of these issues.[26] While they were drawn in extreme fashion, *i.e.* the positions were developed to their logical conclusions, and were not proposed as documented position-papers, the framework is one of considerable value and utility in aiding thought about problems in the field of criminal procedure.

In working with these models, it is of some assistance to think in terms of role behavior. Often an assumption is too easily made, and if taken too literally is guilty of leading to the worst sort of generalization. The distortions such an assumption introduces may be ascribed to an attempt to abstract, rather than to label and categorize. The value of identifying roles with attitudes lies not in any typecasting of stereotypes, but in its amplification of Packer's models. They are in no way intended to be descriptions of reality, but compilations of a network of common attitudes, grouped together for conceptual but not critical purposes. There are three main roles within the legal profession having a bearing on the problems in the criminal process.

[25] Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, 324.

[26] Packer, *Two Models of the Criminal Process,* 113 U. PA. L. REV. 1 (1964).

The prosecutor and the police officer, whose roles have overlapping functions and common concerns, may be regarded as performing the total prosecution function, and can be termed "prosecution officials." It is not unreasonable then, to identify them with the viewpoint of the Crime Control Model. The polar opposite, conceptually, is the defense lawyer. His role is conceived of as indispensable to the adversary system, as was established in *Gideon v. Wainwright*,[27] so that he may be viewed as functioning in an oppositional capacity —his role is to oppose the prosecution officials by the use of certain techniques and strategies, one of which is the assertion of constitutional rights in the criminal process. Hence he might be expected to be closely identified with the values implicit in the Due Process Model.

This leaves the position of the judge unresolved. The paradigms are so extremely drawn that it would be grotesque to identify the judicial function with either position. Ideally, of course, the answer to where he might be expected to locate himself would be in the center. In one sense this is where he does find himself—the impartial, independent functionary, passively awaiting issues to be raised for decision and listening to arguments by the proponents of differing viewpoints. The judicial role might then be described as one attempting to satisfactorily balance all competing interests by weighing them on a case by case basis, trying to achieve a plateau of compromise between the peaks of partisan emotion. Unfortunately, this description is too simple and inaccurate. The very purpose of the adversary proceeding is to persuade the judge one way or the other.[28] The parties would have it no other way, and the nature of the office does not provide for other alternatives. The judicial role thrusts on its officers the necessity for choice. Compromise, a human emotion, is not always a practicable solution. However, the

[27] 372 U.S. 335 (1963).

[28] This is standard legal realism. See generally FRANK, LAW AND THE MODERN MIND (1930); LLEWELLYN, OUR COMMON LAW TRADITION: DECIDING APPEALS (1960). In recent years the identification and appraisal of outcome-determinative factors in judicial personalities and background experience has been the subject of intensive study. See SCHUBERT, CONSTITUTIONAL POLITICS (1960); SCHUBERT, JUDICIAL BEHAVIOR (1964); SCHUBERT, JUDICIAL DECISION-MAKING (1963); SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); SCHUBERT, THE JUDICIAL MIND (1965). For a discussion and more complete bibliography on this topic, see *A Symposium, Social Science Approaches to the Judicial Process*, 79 HARV. L. REV. 1551 (1966).

judge is concerned less with philosophical unity than with the just result.[29] Accordingly, he is unlikely to wholly subscribe to the viewpoint he selects to guide him in the given case. He does not deprive himself of his independent position, and retains his prerogative of changing his mind or of reaching different results in later cases. He is not a hostage to the viewpoint with which he chooses to agree. Nevertheless, in the long run, patterns of preferences will reveal themselves in his opinions, and he will inevitably be classified as being on one side or the other[30]—a misleading but apparently unavoidable phenomenon. While such labelling may or may not be of some assistance, it must be acknowledged that the position is assumed to be one independently arrived at and held, and frequently takes the form of a compromise.

This article is directed towards exploring the interaction of attitudes and roles in the legal profession of North Carolina in terms of Packer's framework. By analyzing verbalized responses to a series of questions concerning the impact, effect and value of the Supreme Court's decision in *Mapp v. Ohio*,[31] it is hoped to appraise to which of the two models the situation in the state approximates, both at the operational and the doctrinal level, and the likely trends in both areas. By approaching the participants' responses in terms of roles, it is hoped to elucidate the relevance of the models to reality, and the degree of difference in opinion existing between the various groups. The idea was suggested by an article by Professor Stuart Nagel[32] who set out to demonstrate that the net result of *Mapp v. Ohio* was that "between 1960 and 1963 those twenty-four states forced to initiate the rule have undergone more changes of various kinds relevant to the rule than the twenty-three states that had the rule all along."[33] The focus of Nagel's study was "primarily directed at comparing the differences in behavioral changes between the newly exclusionary and the former exclusionary states."[34] This study is less ambitious in scope. The main inquiry is directed towards expressions of opinion concerning the effect, significance and

[29] See generally FRANK, LAW AND THE MODERN MIND (1963).
[30] See materials cited note 28 *supra*.
[31] 367 U.S. 643 (1961).
[32] Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283.
[33] *Id.* at 285. Nagel's methodology, which, with some slight modifications, was the one this study employed, is reported at 284.
[34] *Id.* at 285.

desirability of *Mapp*. As a subsidiary investigation, and more as a matter of developing a hypothesis, the probabilities of its actual impact are assessed, primarily by deriving inferences from the opinions and comments expressed.

Of course, the ultimate answer sought is whether *Mapp v. Ohio* is being followed in the states. At this point one must proceed carefully and distinguish between the relevance of the rule to the occupations of the various participants. It is not a direct prohibition upon the police; such an undertaking would be impossible to implement, all other considerations aside. The direction is rather to the trial courts. *Mapp* provides a specific answer to a specific question once a certain point in the trial proceedings has been reached. Whether the matter is put in issue by a motion to suppress, or an objection to the admissibility of the evidence at trial, the court is directed that the Constitution requires that illegally obtained evidence be excluded from consideration of the crucial question of guilt or innocence. The arrest and the trial are therefore two separate points in the process at which the exclusionary rule is a decisional factor. It would be of no assistance, however, to treat these two stages together. The societal interests involved, although interconnected, are quite distinct. In discussing the efficacy of *Mapp,* therefore, it is well to specify the scope of the inquiry in terms of the policy issues sought to be explored. The basic policy may be described in vague terms as the "right to privacy." Within this comprehensive formulation, there are two more precise categories: one is the security of one's privacy "against arbitrary intrusion by the police",[35] the other might be entitled a policy of "judicial integrity"[36] in respecting the basic policy. The difficulty of determining the effect of *Mapp* on pretrial behavior by the police has been well described by Professor Allen.

> Insofar as the question is whether the rule actually operates to reduce the number of illegal invasions of privacy, it is one which can ultimately be answered only by empirical demonstration. Such evidence does not now exist. Nor is it an easy matter to devise methods to produce a persuasive empirical demonstration. It is well known that a great many illegal searches and seizures occur in some jurisdictions that for over a generation have applied the exclusionary rule.[37]

[35] Wolf v. Colorado, 338 U.S. 25, 28 (1949).
[36] Elkins v. United States, 364 U.S. 206, 222 (1960).
[37] Allen 33-34.

Thus, the emphasis of this study is on the *Mapp* rule at the trial level, focusing on the period subsequent to the decision to prosecute, and the reactions of the various functionaries to a given norm in terms of their expectations, assumptions and understanding of its scope and purpose. Although they round out the model scheme, the problems raised by Allen are not dealt with, either in the questionnaire or the analysis, except in the most tangential fashion. There can be no satisfactory alternative to direct observation as a technique to reach some conclusions about the effectiveness of *Mapp* at police level. One might even go further, and ask whether it is even necessary to prove that *Mapp* operates successfully in limiting abusive police conduct. As Professor Kamisar has remarked, "The fact that there is little agreement and little evidence that the exclusionary rule does deter police lawlessness is much less significant, I think, than the fact that there is much agreement and much evidence that all other existing alternatives do not."[38] Whether we have *Mapp* or not, the argument runs, the police are not going to be affected to any significant degree. The controls necessary for implementation of the "invasion of privacy" policy must be supplied by other agencies of the community, for example, an independent officer such as the "Ombudsman"[39] or an agency with power to investigate the police and to impose some type of sanction, such as a civilian review board.[40] Allen indicates as much in a perceptive passage.

> Putting aside all questions of corruption or improper political pressures, the police may permit themselves policies of 'prevention' and harassment, involving the range of traditional illegalities from illegal detention of persons to unauthorized destructions of property. The threat of the exclusionary rule is likely to have little potency here, for these police activities are not pursued with criminal prosecution as the end in view. The uncomfortable possibility even exists that the presence of the exclusionary rule in a jurisdiction may in certain situations influence the police to reject efforts to make a case for formal prosecution and to rely on such informal and illegal sanctions as they see fit to devise and apply.[41]

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[38] Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1150 (1959).

[39] Gellhorn, *Finland's Official Watchmen*, 114 U. PA. L. REV. 327 (1966); Gellhorn, *The Norwegian Ombudsman*, 18 STAN. L. REV. 293 (1966).

[40] See Note, *Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964) for a discussion.

[41] Allen 39.

An integral part of any efforts to so restrict wrongful police activity is an aroused public opinion.[42] The question remains, how to arouse public opinion in such a manner that pressure to conform with the requirements of the Court and Constitution will be consistent and steady, rather than temporary, irrational and selective. It might be argued that the *Mapp* rule, reinforcing as it does the policy of judicial integrity, can provide, if not the impetus for an aroused community conscience, at least support for more activist groups in the community. While *Mapp* cannot serve as proof of public disapproval, it can serve as evidence of formal disapproval of invasions of privacy, reinforcing and supporting community disapproval. At this point opinions diverge. Frankfurter felt that such a rule could only do more harm than good; in *Wolf v. Colorado* he argued that:

> The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.[43]

To this perhaps the better answer is that made by Professor Kamisar:

> I share the view that the incidence of sensational police misconduct is much lower in the search and seizure field than in the confession area. I agree that illegal searches are typically less offensive to the dignity of the citizenry and less often characterized by violence and brutality than are illegal interrogatory practices. But for precisely these reasons they are also less likely to attract the interest of the press, less likely to arouse community opinion, less likely to excite the sympathy of jurors.
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> It is in large measure because 'illegal searches and seizures lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer' that 'no other constitutional guarantee is so openly flouted with so little public outcry.' It is in large measure because this is so that there is a special need for judicial intervention.[44]

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[42] Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, 342.

[43] 338 U.S. 25, 32-33 (1949).

[44] Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts,* 43 MINN. L. REV. 1083, 1098-1100 (1959).

There are three preconditions which have to be met before the social philosophy expounded in *Mapp* will become a meaningful right available to all the citizens of the United States: (1) there must be a reasonably widespread knowledge of its thrust and purport, both among the public and police; (2) there must be a clear understanding of its scope, and its meaning at the enforcement level; and (3) there must be a general acceptance of its authority at all levels, both within enforcement agencies and other social institutions such as the press.[45] In sum, there must be some willingness however reluctantly given, and however keenly resented, on the part of all concerned to respect the limitations *Mapp* imposes. The greater the extent that *Mapp* has passed into the collective consciousness of those most immediately concerned with its effect, the greater are the prospects of compliance.[46] The focus of this inquiry is to explore the degree to which *Mapp* has become part of the assumptions of interested parties in a single jurisdiction. From this it is at least possible to conjecture as to the likelihood of its being rendered operative to at least some degree.

It was hypothesized that the percentage of concerned participants aware of the existence of the *Mapp* decision and its evidentiary effect would exceed the number who were not due to the existence of an exclusionary rule by statute in North Carolina since 1951.[47] The *Mapp* rule was expected to do little to alter the existing state of affairs except, perhaps, to reassert the importance of the policy. Further, it was hypothesised that the degree of acceptance of the implications of the rule would divide fairly clearly, with prosecution officials closer to the Law Enforcement Model and defense lawyers closer to the Due Process Model. Attitudes were expected to be consistent with those assumed as inherent in the nature of the different roles. As to the judges, it was hypothesised that they would not divide as cleanly as the other two categories. They were expected to reflect ambivalent feelings towards the exclusionary rule, forced on them by an awareness of the merits of a

[45] Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, 342.

[46] See Traynor, *Lawbreakers, Courts, and Law-Abiders,* 31 Mo. L. REV. 181 (1966).

[47] N.C. GEN. STAT. § 15-27.1 (Supp. 1965). Professor Alden Lind, of the University of North Carolina political science department, has suggested that such a finding is tentative since there is no way to preclude the possibility that ignorance of this issue led to the remaining questionnaires not being returned.

policy against police wrong-doing and the cost to society of enforcing such a policy: in Justice Cardozo's words, "The criminal is to go free because the constable has blundered."[48] It was hypothesized that trial judges, confronted by such a choice, would tend to think in terms of liberalizing the requirements for a valid search and seizure, rather than see wrongdoers escape unscathed.

The means used to carry out the study was to mail out a questionnaire, part of which contained various propositions and part of which asked specific questions, about the *Mapp* decision.[49] The correspondents were asked to either express an attitude (agreement, disagreement or neutral) to the propositions, or answer the questions directly, as best they could, in the absence of data available to them. The questionnaires were mailed out to police chiefs, sheriffs, prosecuting attorneys, defense lawyers and trial judges in North Carolina. An effort was made to include representatives of all groups from small and large population centers. The names of all except defense lawyers were obtained from official lists. Defense lawyers' names were selected from the list of practitioners attending the North Carolina Bar Association Institute on Criminal Law. A total of 209 Questionnaires were mailed out, of which 90 were returned, for a satisfactory percentage of 43%.

The returns revealed that the hypotheses were, by and large, correct. However, there was one significant feature that was totally unexpected. That is the rapidity and extent with which *Mapp* has passed into the collective consciousness of the participants concerned. The *Mapp* ruling seems to have captured the imagination of the legal profession and enforcement officers throughout the United States to a marked degree.[50] Part of the explanation of this reaction may be the fact that the case marks the first attempt on the part of the Court to formulate rules for the conduct of the police in the time period between the commission of the offense and the arraignment.[51] This is only a partial explanation, however, for in those states having an exclusionary rule one would expect a calmer response to an opinion doing nothing more than affirming the legisla-

[48] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[49] The questionnaire is reproduced as Appendix A.

[50] See Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, for supporting data from a national sample.

[51] As such, it was merely the first step in an evolutionary process which moved from *Mapp* through Escobedo v. Illinois, 378 U.S. 478 (1964), to Miranda v. Arizona, 384 U.S. 436 (1966).

tively declared policy of that jurisdiction. However, the response in North Carolina, a previously exclusionary state, seems to be not much different from that in non-exclusionary states.[52] *Mapp,* then, seems to have had an unexpected and, all things considered, not undesirable effect, in North Carolina. It would seem that for the first time a large percentage of the participants concerned were made aware of the policy, and that it was not merely a local one, but had been raised to the dimension of a constitutional requirement. Therefore, *Mapp* had the effect of drawing attention to the existence of an identical rule enacted by the General Assembly, making it harder to overlook or ignore the terms of state policy. In North Carolina *Mapp* should be regarded as reinforcing local policy rather than imposing it from the top. The explanation for the response may be that it served to remind officials of the state rule, which many may have forgotten, or never known. To some extent, this inference seems permissible from the returns received. Of the trial judges, 5 (18 per cent); of the prosecution officials, 14 (34 per cent); and of the defense attorneys 6 (29 per cent), answered "No" to the question: "Did your State require the exclusion of illegally seized evidence from court proceedings prior to 1961?"[53] This is a remarkably high percentage, and provides an argument for *Mapp,* even in an exclusionary state. The decision has served not only to remind people of the existence of the local rule but also has stressed for them the fundamental significance of the doctrine. The right to be protected against invasions of privacy is, after all, a more abstract one than the right against self-incrimination in the coerced confession area, for example. It is further, as Mr. Justice Jackson observed, "one of the most difficult to protect."[54] That the rule is one of fundamental importance in North Carolina can brook no doubt; any rule of the General Assembly, affirmed as a constitutional requirement by the United States Supreme Court is clearly a basic policy. Whatever their views would have been prior to 1961, it would seem that the majority of the participants have come to so regard the rule now. When asked whether "reliable evidence should be admitted in state courts whether or not it was legally obtained," only 8 per cent of the judges and 10 per cent of the lawyers ap-

[52] See Nagel, *Testing the Effects of Excluding Illegally Seized Evidence,* 1965 WIS. L. REV. 283.

[53] See Appendix B.

[54] Brinegar v. United States, 338 U.S. 160, 181 (1949).

proved, while 59 per cent of the prosecution officials were in favor. The latter figure is interesting—23 per cent strongly approved the proposition, while 36 per cent approved. On the other hand, 20 per cent disapproved, and 18 per cent disapproved the proposition strongly.[55] Thus 38 per cent of these officials, or nearly four in ten, were not in favor of such an approach to the problem. This is significant, when one bears in mind that one of the strongest arguments against *Mapp* is that it renders inadmissible perfectly reliable and relevant evidence against the accused.[56] Finally, a scrutiny of the questions and the responses permits the conclusion that knowledge of the existence of the problem is fairly well diffused among the participants concerned. They commented freely on the issues raised, and few of them pleaded no knowledge of the topic. It is not beyond conjecture that the publicity attendant on the *Mapp* decision helped create an awareness of the problem.

One other matter worth comment is the response to the question whether "The State courts should apply the same standards as the federal courts." This, of course, is directed to the troublesome question of the federal-state relationship, and the entire problem of the "Preservation of a proper balance between federal and state responsibility in the administration of criminal justice."[57] While it is possible that the question was misunderstood, and was considered to refer to an argument that the federal standard should be lowered to a more tolerable level, it is extremely unlikely in the light of the wording of the question. There is nothing theoretical about the question—it refers specifically and clearly to the "standards" applied in "the federal courts." The replies reinforce the argument that there is a general awareness of the *Mapp* rule, since otherwise the number of persons answering "undecided" would surely have been greater. The willingness to express an opinion with regard to the "standards" applied "in federal courts" implies knowledge or assumption of knowledge of the content of the rule. To this question, 66 per cent of defense lawyers, and 61 per cent of the judges responded by agreeing. The prosecution officials' response, however, was only 41 per cent in favor, of whom only 15 per cent agreed strongly. There was a 16 per cent undecided vote revealing some uncertainty and lack of a clearcut position among the group

[55] See Appendix B. Of course, *Mapp* renders this criterion irrelevant.
[56] See Appendix B.
[57] Mapp v. Ohio, 367 U.S. 643, 680 (1961).

one would anticipate as being most in favor of such a proposition.[58] While further questions which are as yet unanswered must be asked of these figures, it does seem that in North Carolina there is considerable support for the solution settled upon, and, it is arguable, an equivalent absence of any desire for experimentation or change.

Inferential support for this interpretation is derived from the responses to the questions following the one above. The following propositions were put to the correspondents for their approval or disapproval: first, that "Exclusion of evidence is an effective way of reducing the number of illegal searches." Here, there was very little disagreement; the prosecution officials were, in fact, more in agreement than defense lawyers: 64 per cent to 62 per cent. Judges were 78 per cent in agreement.[59] This leaves unexplained such questions as the extent of reduction of wrongful searches and seizures, the situations where it occurred, the factors underlying this attitude; or whether it means no more than that police are willing to forego physical evidence in the hope of obtaining a confession.[60] The high percentage of judges, as compared to the relatively low figure for defense lawyers, might reflect an optimism induced by a view somewhat removed from the arena. Closer contact would seem to lead to a slightly more pessimistic outlook. Finally, the question was put whether "Civil and criminal proceedings against law enforcement officers should be the sole means of enforcing the requirements of legal search." To this, 15 per cent of prosecution officials approved, as against 5 per cent and 3 per cent for defense lawyers and judges, respectively.[61] These figures are surprising only in the comparatively high figure for prosecution officials. They are quite consistent with arguments that such remedies are not only ineffective, they are also virtually unavailable. This may be seen from replies to two other questions: one asked "To your knowledge how many times have law enforcement officers in your state been subjected to civil proceedings or criminal prosecutions for committing illegal searches?" 98 per cent of prosecution officials, 90 per cent of defense lawyers and 93 per cent of judges[62] had never heard of such a suit having been brought. Secondly, they were asked "Would you

[58] See Appendix B.
[59] *Ibid.*
[60] LAFAVE, ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY, 430 (1965).
[61] See Appendix B.
[62] *Ibid.*

advocate or willingly participate in such proceedings against law enforement officers?" Only 38 per cent of defense lawyers answered "Yes," while 48 per cent were of a contrary view. Of the prosecution officials, 23 per cent voted "Yes," 69 per cent voted "No,' and 21 per cent of the judges, as against 64 per cent were for "Yes."[63] Thus, the profession as a whole would seem unsympathetic to such suits. (Feelings on civilian review boards, or disciplinary boards were not sought, unfortunately.) There are a number of possibilities as to why this is so. It is not hard to understand police and prosecuting attorneys' reluctance to assist such suits, and defense lawyers might either be prompted by feelings of sympathy or an experienced awareness that very little is to be gained from such actions. The penalties are quite disproportionate to the evil very often, and the prospects of recovery quite remote. The net result, then, would seem to reaffirm Justice Murphy's point that such remedies do not deter, simply because they do not work. In the main, it would seem, the participants in the criminal process in North Carolina have reached the same conclusion as Murphy: "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence."[64]

There were two questions directed to the problem of what is considered illegal means for obtaining evidence, plus some subsidiary questions dealing with preferences as to the most satisfactory approach to balancing the competing interests involved. With regard to the question "Are general exploratory searches permitted in your state if predicated on a valid search warrant,"[65] only 20 per cent of the prosecution officials asked answered "Yes." On the other hand, 29 per cent of defense lawyers and 32 per cent of the judges responded in this manner.[66] This is a puzzling phenomenon. The prosecution officials seem more aware of the illegality of general warrants than either defense lawyers or the judges, both of whom would be expected to display greater vigilance over unlawful conduct than the police themselves.[67] It is not inconsistent with their answer that

[63] *Ibid.*

[64] Wolf v. Colorado, 338 U.S. 25, 44 (1949) (dissent). See also Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493 (1955).

[65] See Appendix A.

[66] See Appendix B.

[67] Wolf v. Colorado, 338 U.S. 25, 44-46 (1949) (dissent).

the police are in fact carrying out exploratory searches; they were merely asked whether they are permitted, *i.e.*, not prohibited, by the courts. If so, there might be a partial explanation for the high defense lawyer figure. Whatever the case law provides, in fact such warrants are permitted. At any rate, this would require reading the question in an ambiguous fashion, which is a possibility which cannot be eliminated. The word "permit" might well have been construed as referring to reality, rather than the judge-made norm. In any event, the matter is puzzling, and is worth further investigation. The responses to the second question are more consistent with the case law. This time the prosecution officials were the high return with 20 per cent, to 14 per cent for defense lawyers and 18 per cent for the judges,[68] answering "Yes" to the question: "Can search and seizure without a warrant be justified in your state if the evidence thus produced justifies a subsequent arrest?"[69] These figures, taken together, leave little room for satisfaction—one in five prosecution officials believes either that exploratory warrants are permissible or that an arrest can be justified by subsequently obtained evidence. There would appear to be a need for some provision for informing officials throughout the state of the developing case law in this field. That the figures were as low as they were is in itself a fact worth investigation. What factors are operative to lead to such a good result? Prudent, common sense thinking, or resort to existing sources of instruction and information?

That the existing state of the case law does not appear to the participants to provide for the most equitable balancing of the interests involved would appear to be the inference derived from a series of questions concerning the need for readjustment. 90 per cent of prosecution officials and 71 per cent of the judges thought that "The requirements of a legal search should be liberalized."[70] This drew approval from only 39 per cent of the defense lawyers.[71] They were also lukewarm to the proposal that "the procedure for obtaining a valid warrant should be flexible,"[72] only 39 per cent agreeing, while 62 per cent of the prosecution officials were in favor. The judges, surprisingly, were 78 per cent in favor of this suggestion.[73] This

[68] See Appendix B.
[69] See Appendix A.
[70] *Ibid.*
[71] See Appendix B.
[72] See Appendix A.
[73] See Appendix B.

might be explained either on the basis that the judges feel that the established practices ought to be at least formalized and legitimated, or that the present procedures for obtaining warrants are unduly restrictive.[74] Finally, 82 per cent of the judges were in favor of the suggestion that "The definition of what constitutes a 'legal search' should be broadened,"[75] with 90 per cent of the prosecution officials, and 43 per cent of defense lawyers approving.[76]

How are these responses to be reconciled to the views expressed earlier that the exclusionary rule does effectively reduce wrongful searches and seizures; that evidence should not be admitted solely on the basis of its reliability but also on the basis of the mode of acquisition?[77] There does not appear to be an obvious explanation for this response on the part of the judges. The other positions, it may be urged, are quite consistent with the general attitudes identified with the particular roles. However, the judges seem to have come down very strongly from the prosecution position on these matters, whereas elsewhere they had taken a more independent position, closer, if anything, to the defense lawyers' point of view.

Therefore, it may be profitable to turn to a consideration of the pattern of judicial responses in order to determine the trends and preferences visible in the judges' approach to various facets of the problem. The objective of such an analysis is to discover, if possible, the model which the judges most closely resemble, the degree to which they approximate the attitudes inherent in the model regarded as an extreme position, the points where they differ most sharply from the model, the factors influencing their outlook, and the values discerned by them as prevailing and which shape their viewpoints on specific issues. There is no attempt to investigate extrajudicial factors influencing outcomes[78] or to psychoanalyze at second-hand. Further, as the study is anonymous, there is no attempt to determine whether individual backgrounds can be of assistance in predicting attitudes. Rather, this is an attempt to describe the attitudes in terms of fictitious polarities to gain some insight into judicial thinking in this area.

What was described in *Elkins v. United States* as "the impera-

[74] State v. Upchurch, 267 N.C. 417, 148 S.E.2d 259 (1966).
[75] See Appendix A.
[76] See Appendix B.
[77] See text accompanying notes 55-57 *supra*.
[78] See note 28 *supra* for a partial bibliography of research into this question.

tive of judicial integrity"[79] seems to be the predominant factor in shaping judicial thinking in these problems. While there do appear to be areas of the problem where they display some unfamiliarity, by and large the trial court judges in North Carolina have a firm grasp of the import of the *Mapp* decision, together with a shrewd insight into both the gains and costs to the administration of criminal justice imposed by the Court's decision in that case. Further, their viewpoint is stubbornly independent, and is reflective of a body of administrators compelled to make the system work and on whom the brunt of converting the mandate of appellate bodies into living law falls with all the frustrations and difficulties attendant on that task. They would appear to fall within neither the Due Process nor the Crime Control Model, but seem to be charting a course containing movements in both directions, with, if anything, a tendency to sail closer to the latter model than the former, yet distinct and independent of both.

Basically, the judges seem to approve of the policy formulated in *Mapp,* and enacted by the state legislature in 1951. 78 per cent thought that it was "an effective" way to reduce the incidence of wrongful searches and seizures, and few had any illusions about civil or criminal proceedings against offending officers as being effective techniques for restraint.[80] The prevailing viewpoint, moreover, was that the exclusionary rule is not only more frequently raised as an issue at trial, but also is the subject matter of increased judicial activity, frequently leading to release of an accused person who would otherwise be convicted.[81] There appears to be little doubt that the exclusionary rule has been accepted by the judges as an integral part of the norms of the criminal trial in North Carolina. At the same time they are extremely conscious of the costs imposed on the police by the rule. 50 per cent of the judges thought that the morale of law enforcement officers had decreased "a little," and 32 per cent that it had decreased "substantially."[82] Further, 25 per cent were of the view that police effectiveness had decreased "a little" and 25 per cent that it had decreased "substantially."[83] The judges are convinced that the police are conscientiously trying to conform to the requirements placed upon them, and that they are try-

[79] 364 U.S. 206, 222 (1959).
[80] See text accompanying notes 60-63 *supra.*
[81] See Appendix B, judges replies to questions 1 through 5.
[82] See Appendix B.
[83] *Ibid.*

ing to familiarize themselves with the limitations under which they will have to operate in the future.[84] However, only a few judges were willing to claim that "the number of search warrants issued has increased (7 per cent substantially and 14 per cent a little).[85] Granted that there is no usable data on the question of search warrants and practices with regard to them, it does seem anomolous to assert police compliance with *Mapp,* and at the same time be of the opinion that use of warrants has decreased, as did 29 per cent of the judges asked (11 per cent a little, and 18 per cent substantially).[86] It would have been more consistent to express no opinion (as did 25 per cent) on the subject.[87] Unfamiliarity with the recent case law is indicated by the high percentage of judges who thought that there was no exclusionary rule prior to 1961 (18 per cent);[88] and that searches and seizures without warrant can be justified by production of evidence arising therefrom (18 per cent).[89] These responses may highlight a problem which has become apparent only recently.[90] This is the fact that the speed with which criminal procedure has developed in the past five years has outstripped the state court judges' capacity to absorb and digest the emergent body of constitutional principles. This is quite simply a failure in communication. There are no facilities for keeping the judges up to date on happenings in this area which, important as it is, is only a part of a large amount of subject matter with which a very busy and overworked group of men must stay familiar in order to perform their tasks. Regular seminars or institutes at regular intervals might quite easily fill this gap by communicating to the judges happenings in a large number of courts all over the country. It is surely an imposition to expect the judges to stay abreast, unassisted, of a highly sophisticated and complex area of law.

A possible hypothesis explaining the sometimes rather strong pull exhibited by the judges towards the Crime Control Model might be that it is a characteristic of judges to "pour oil on troubled waters" and to act in accommodating fashion towards anyone showing aggression. This hypothesis is suggested by the results of a

[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*

study conducted by Walther and McCune at the Center for Behavioral Sciences at George Washington University on a selected group of Juvenile Court Judges.[91] According to the researchers, the methodology used was the Job Analysis and Interest Measurement Inventory:

> The elements measured by the JAIM include behavioral styles (the consistent ways in which a person organizes and directs his mental, physical and energy resources to accomplish his goals), work preferences (the explicit choices that represent the anticipation of intrinsic satisfaction from the performance of certain types of tasks), and values (the criteria against which the performer judges the "goodness" and "badness" of his work).[92]

The study was conducted on 292 juvenile court judges, over 90 per cent of whom had been trained as lawyers, and 48 per cent of whom had served over five years. The following conclusions, if valid for the judges in the present sample, might go a long way to explaining some of these responses:

> Judges and lawyers were found to have different styles for reacting to aggressive behavior. Judges tend to "pour oil on troubled waters" (Move toward Aggressor) when someone acts belligerently or aggressively, while lawyers were more likely to fight back (Move against Aggressor). . . .
>
> A further difference between judges and lawyers was in their attitudes toward authority. The judges tend to identify with authority; the lawyers tend to be independent and autonomous.[93]

What this study does not disclose is whether these characteristics are functions of personality or of assumed expectations with regard to the office—*i.e.*, whether people becoming judges display these characteristics, or whether on becoming judges they adopt them.[94] Again, authors caution that "Since no study was made of the behavioral styles and values in other jurisdictions, we do not know whether the same differences found between lawyers and juvenile court judges would also emerge from a comparison of lawyers with judges in general."[95]

It would be sheer speculation to attempt an explanation of the

[91] Walther & McCune, *Juvenile Court Judges in the United States,* 11 CRIME & DELINQUENCY 384 (1965).
[92] *Id.* at 385.
[93] *Id.* at 386 n.74.
[94] *Id.* at 392 n.7.
[95] *Id.* at 391 n.6.

judges' responses in terms of this hypothesis. Nevertheless, in the light of the sharp and sometimes bitter response of enforcement officials to Supreme Court cases, and noting the comparative lack of "aggression" displayed by defense lawyers in the returns, there is an element of plausibility in such conjecture, and a study along these lines might throw valuable light on this entire question.[96]

An issue of some importance to the working of the exclusionary rule, is that of the relationship between prosecuting attorneys and the police. Since he lacks any control or authority over their conduct, but bears the burden of any sanctions imposed on wrongful police conduct, under the *Mapp* rule, the prosecutor might be forgiven a feeling of frustration and irritation at any abusive police conduct at this time.[97] If it can be considered penal in nature, the *Mapp* rule operates as a penalty on the prosecutor by imposing restrictions on the types of evidence he may introduce, and, in some instances, depriving him of usable testimony and conceivably a conviction as well. While it is one thing to assert that the *Mapp* rule is directed at assuring that the fourth amendment right to privacy will no longer "be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment";[98] it is quite another matter to assume that all police violations of the prohibition are carried out under the supervision, approval or even awareness of the local prosecuting attorney. While this may quite often be the case, there are two situations where a legitimate argument might be made that the operation of the rule works to penalize an official unfairly. Specifically, these are the cases where the prosecutor has either no knowledge of unlawful police conduct in his area, or where his admonitions to the police to cease from such activities are disregarded. The argument that the rule does not penalize him but the police can be asserted only by the assumption that the primary function of the police is an evidence-gathering one

[96] Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, 328, predicts the trend that is likely to develop:

> Nevertheless the United States Supreme Court still confronts a special new responsibility of its own. Sooner or later it must establish ground rules of unreasonableness to counter whatever local pressures there might be to spare the evidence that would spoil the exclusionary rule. Its responsibility thus to exercise a restraining influence looms as a heavy one.

*Ibid.*

[97] Spector, *Mapp v. Ohio: Pandora's Problems for the Prosecutor,* 111 U. PA. L. REV. 4 (1963).

[98] Mapp v. Ohio, 367 U.S. 643, 660 (1961).

for purposes of prosecution and that excluding evidence defeats their objective. This proposition has been challenged by some of the data accumulated by the Administration of Criminal Justice Series of the American Bar Foundation.[99] It is clear that the police view the arrest function as serving a multiplicity of policies, of which prosecution can often appear to be a minor consideration. If *Mapp* is interpreted not as a matter of policy imposing a penalty, but rather as attempting to assert the fundamental principle of "judicial integrity" in the face of official lawlessness, enabling the judge to refuse to admit within the confines of the judicial process any evidence so obtained, then the act of excluding testimony will be seen not as an attempt to penalize the prosecutor but rather a technique to preserve the integrity of the process and the dignity of his office.[100] It would be of some interest to determine the impact of the *Mapp* holding on police-prosecutor relationships since it might be hypothesized that prosecutors regarding the case as penalizing themselves unjustly would tend to sympathize with the police, thereby increasing the improbability of widespread police conformity to the rule; whereas the opposite situation, where the prosecutor is resentful of police created difficulties, would tend to reduce the number of cases containing police abuses being brought before the courts and possibly encourage an increase in conformity to *Mapp*.

As the returns were not adequate to distinguish the two separate, albeit interconnected, roles of police and prosecutors, they were treated together. Combining the returns from both reveals that a fair assessment of their general attitude is that while they are prepared to live with *Mapp*, they by no means love it. Mr. Michael Murphy, a one-time Commissioner of Police of New York City epitomizes the "police" viewpoint. In a speech delivered at the University of Texas Law School in December 1965, he described *Mapp* as having "a dramatic and traumatic effect." He continued further:

> I dwell on the details of this impact in terms of the administration of a large police force so that you may understand that the decisions arrived at in the peace and tranquillity of chambers in Washington, or elsewhere, create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their

[99] LAFAVE, ARREST Chs. 14-16, 21-24 (1965). See also Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

[100] Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 324.

> very foundations upward .... On behalf of the New York City Police Department as well as law enforcement in general, I state unequivocally that every effort was directed and is still being directed at compliance with and implementation of *Mapp*. While there was, and perhaps should have been, some grumbling and bitter realization that the criminal element had again gained an advantage, although clearly not so intended by the court, there was also and more importantly a good faith effort to conform to this new interpretation of the Constitution.[101]

The approach adopted, of treating all prosecution officials' returns together, may be misleading since there is no means of determining whether the cumulative percentages are reflective of either police or prosecutorial attitudes severally. Nevertheless, assuming that the discrepancies are not too great, Mr. Murphy appears to be representative of enforcement officials in North Carolina in his feelings of frustration and disappointment. By and large, the officials who responded to the questionnaire seem to view themselves as conscientious, hard working professionals, diligently attempting to carry out their responsibilities despite the handicaps imposed on them by an unsympathetic and critical society. The burden of their dissatisfaction is not that the Court is malicious, but that it does not have an adequate understanding of the problem and the consequences of its decisions. The primary effect is that it results in an increasing number of wrongdoers going free, to continue their threat to order in society, leaving the police helpless to prevent this.

Thus, while 64 per cent of the police and prosecution officials concede that the exclusionary rule is an effective way to reduce the incidence of wrongful searches and seizures, 79 per cent feel that it hinders effective law enforcement, 80 per cent that police morale has decreased, 64 per cent that the rule hinders them from effectively obtaining legal evidence through searches and seizures, and 100 per cent of them feel that the number of guilty persons going free due to the limits imposed on admissibility has increased. 95 per cent feel that the defense of an illegal search and seizure has increased, and 75 per cent that trial judges more frequently exclude evidence now than prior to 1961. 88 per cent are of the view that the appellate courts act more frequently in this area in overturning convictions. Not surprisingly, therefore, 90 per cent take the position that

[101] Murphy, *Judicial Review of Police Methods in Law Enforcement—The Problem of Compliance by Police Departments*, 44 TEXAS L. REV. 939 (1966).

the requirements for a legal search should be liberalized and that the definition of a "legal search" should be broadened. The figures for the question as to whether "the procedure for obtaining a warrant should be flexible" were lower, only 62 per cent being for the suggestion. Possibly the relatively low response can be explained by the low number of officials who felt that "the number of search warrants issued has increased"[102]—13 per cent. In light of Commissioner Murphy's assertion that the number of warrants issued in New York had increased substantially as part of the effort of comply with *Mapp,* this figure would appear to justify an inquiry into search warrants in North Carolina. It is not improbable that the reason relatively fewer officials wished for a more flexible warrant procedure is that relatively infrequent use is made of the established one. In *State v. Upchurch,*[103] the assistant clerk of the superior court for Durham County testified that: "Usually when the officers come for a search warrant, all I can say is they come in and ask if I will witness their signature, and I witness it."[104] The Supreme Court of North Carolina reversed since the warrant was illegally issued and ordered a new trial. The question remains, as to how many warrants are issued in this form, not only in that county, but statewide. Again, there does not seem to be any formal provision for the training of court personnel in the statutory requirements for a valid warrant. Mr. Murphy has argued that the relevant test for "probable cause" ought to be what an "experienced police officer" would decide to do. However that may be, there does appear to be a significant gap in police awareness of the requirements of a valid warrant, which could be rectified relatively easily and thereby avert much friction in this area.

Concerning the response of defense attorneys, the current orthodoxy is that counsel is indispensable to enable accused persons to conduct an adequate defense. This is the cornerstone of *Gideon v. Wainwright*[105] which made the proposition a reality, leading to the establishment of the premise as both an "is" and an "ought" of the criminal process. The foundation of this cornerstone is a set of assumptions about the nature of a criminal trial, and in fact, the nature of the entire criminal process[106] and the role of the lawyer

[102] See Appendix B.
[103] 267 N.C. 417, 148 S.E.2d 259 (1966).
[104] *Id.* at 418, 148 S.E.2d at 260.
[105] 372 U.S. 335 (1963).
[106] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378

in it—it is both an indispensable element of due process and an element to render due process effective in the system. In Professor Packer's words, "The Due Process Model, with its adversary and judicial bias, makes counsel for the accused a crucial figure throughout the process; on his presence depends the viability of this Model's prescriptions."[107] In short, the nature of the adversary process is such that in the assertion of constitutional rights, the burden of raising the issue has devolved on the legal profession when in the role of providing the defense in criminal trials. It is not prerequisite that they approve all the changes in doctrine for them to perform their function in a competent, efficient manner by using for the benefit of their clients advantageous developments in the case law.[108]

The responses to the questionnaires by those lawyers available for defense work reveal a high degree of sympathy for the prosecution officials' viewpoint. On the other hand, they reveal a somewhat hard-headed and cynical approach, and one might summarize the responses by describing them as revealing a somewhat quizzical sympathy for the problems of the police. Whether this permits the inference that they are proportionately less responsive to due process issues than they are sympathetic to the police viewpoint is not answered by this study. Analysis of the reported decisions of the state supreme court reveal that from volume 255 to volume 267 there were a total of fourteen opinions dealing with search and seizure, a ratio of slightly above one per volume. The relatively slight volume of appellate court work may only prove that the great bulk of motions to suppress are granted at the trial court level, leaving little or no work for the supreme court. Another possibility is that although counsel raises it on appeal, the higher court feels that it has no merit, prefering to dispose of the case on other grounds.[109]

The defense attorneys do not seem entirely convinced by the *Mapp* decision. 39 per cent feel that the requirements for a legal

U.S. 478 (1964). See Packer, *Two Models of the Criminal Process,* 113 U. PA. L. REV. 1, 59 (1964).

[107] *Id.* at 60.

[108] Warren, *Responsibilities of the Legal Profession,* 26 MD. L. REV. 103 (1966).

[109] *E.g.,* State v. Egerton, 264 N.C. 328, 141 S.E.2d 515 (1965). See Penegar, *Criminal Law and Procedure, North Carolina Case Law,* 44 N.C.L. REV. 970, 989 (1966).

search should be liberalized; 39 per cent feel that warrant procedures should be flexible, and 43 per cent that the definition of what constitutes a "legal search" should be broadened. While 66 per cent are in favor of the federal standard being applied in the state courts, and a mere 10 per cent are in favor of admitting reliable evidence irrespective of the mode of obtaining it, only 15 per cent assert that the number of search warrants issued has increased to some degree. Again, 76 per cent feel that police attempts to conform to the requirements of legal searches and seizures has increased, 81 per cent feel that education of police officers in these requirements has increased, and only 5 per cent (as against 20 per cent for the prosecution officials) that morale has increased. However, only 24 per cent feel that the number of guilty persons ultimately going free has increased, as against 100 per cent for prosecution officials and 75 per cent for the judges. Only 43 per cent feel that excluding illegally seized evidence hinders law enforcement.[110]

These figures are ambiguous. They by no means answer the question whether the defense lawyers in North Carolina are making use of the *Mapp* rule. To some extent, there probably has been an increase in the use of the defense, but both the percentage increase and the pre-*Mapp* use are unknown quantities. However, whatever the precise figures, all participants were positive that the use of the defense has increased: 95 per cent of the prosecution officials, 85 per cent of the judges, and a modest (by comparison) 72 per cent for the defense lawyers.[111] As against this, 29 per cent of the lawyers were not aware of the statutory exclusionary rule[112] so that the increase in general awareness of the existence of the federal rule is more likely to lead to an increase in use than otherwise. The fact that the *Mapp* rule is not universally known is illustrated by *State v. Mitchell*.[113] The facts in *Mitchell* would appear to reveal a very good argument for the exclusion of the evidence. Mitchell made a statement to police officer Blackley, in the course of which he identified the hiding place of some stolen goods. Blackley then proceeded to the address, and according to his own testimony, acted in the following way:

> After talking with Mitchell, I went back to see Hinton around 10 o'clock. Officer Perry was with me. We went to his front

[110] See Appendix B.
[111] *Ibid.*
[112] *Ibid.*
[113] 265 N.C. 584, 144 S.E.2d 646 (1965).

> door and knocked . . . . A boy came to the door before we entered. Clementine Richardson rents the house. James Hinton was there asleep; he was staying with her . . . . The boy did not ask us in but his aunt did. She was in the bed in the room when we entered . . . . When I entered the house, I asked where James Hinton was. I asked his aunt and the boy. They said he was in bed; the door was not closed. I went to the bedroom and went on (sic) it. I told him I wanted the clothes that him and Hinton (sic) took. I do not recall if I told him he had lied earlier that night, but I imagine I did, but actually he had lied to me. I do not deny I said 'lied.' I do not think I made such a statement as 'come, let's go to jail' . . . . I had the clothes which Hinton got from the back pantry, and told me where he got them and who was with him at the time.[114]

Under either *Mapp*[115] or *Wong Sun v. United States,*[116] a very strong argument can be made as to the inadmissibility of this evidence. However, counsel chose to confine his argument to the confession Mitchell made. The court ruled that a confession made by a sixteen-year-old boy to a police officer, forty-nine-years-old, and weighing 280-290 pounds, was freely and voluntarily made.[117]

As Arlen Spector has observed, "State courts, especially those at the trial level, tend to place greater emphasis on law enforcement and on community interest than on the protection of individuals' civil liberties."[118] This conclusion would appear to be affirmed by this study. There does not appear to be any single group in the process which is singlemindedly devoted to the maintenance and assertion of due process values. Rather, there appears to be an attempt to balance the values of the Due Process Model with other values, primarily the protection of the community from wrongdoers, with a resultant diminution in the force of the pure model. There do appear to be gains toward incorporating due process values as part of the realities of the system, in particular the increase in awareness by all participants of the restrictions imposed on the police by the state as well as the Court. Overall, however, the trial level seems closer in the outlook of the participants to the Crime Control Model.

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[114] Record, pp. 14-15.
[115] 367 U.S. 643 (1961).
[116] 371 U.S. 471 (1963).
[117] Record, p. 28, State v. Mitchell, 265 N.C. 584, 144 S.E.2d 646 (1965).
[118] Spector, *Mapp v. Ohio: Pandora's Problems for the Prosecutor,* 111 U. PA. L. REV. 4 (1963); Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, 328 n.20.

Professor Allen once remarked that "[*Mapp*'s] ultimate effect on the efficiency and quality of American criminal procedure may well be less than either the critic or the defenders of the decision are likely to concede."[119] This study has not attempted to determine the degree to which *Mapp* has affected the criminal process in North Carolina, but rather the degree to which it is part of the collective consciousness of those whom it affects and the extent of approval or disapproval expressed. There are as yet a large number of unanswered questions in this area and rather than providing answers this study was undertaken with a view to determining what questions must be asked before it can be decided whether *Mapp v. Ohio*[120] is effective. It might be argued that the awareness of the importance of the "right of privacy" asserted by *Mapp* is evidence of its effectiveness.

Whether this state of affairs will remain constant depends on a multiplicity of factors. One of the factors which might significantly affect future trends will be the extent to which educational facilities acquaint those involved in the system with the impact of Supreme Court decisions on their work, and the values and goals underlying these decisions. To ensure the safeguarding of the liberties protected by the Bill of Rights, there ought to be greater familiarity with its provisions and significance among those in position to infringe them, both wilfully and in good faith innocence of the limits imposed. Protection of individual liberties is not always fruitful or popular. Frequently those individuals in need of protection are unattractive, or for one reason or another are felt to be socially undesirable. No matter. Safeguarding their rights is as much a matter of local concern as it is one of concern for national policy bodies far removed from the community.[121] Enforcing compliance with the *Mapp* rule will not solve all the problems. But it is at least a start.

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[119] Allen 1.

[120] 367 U.S. 643 (1961).

[121] Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319.

> Any state that adopted its own exclusionary rule soon learned that the day-to-day responsibility of policing the police involves close and continual examination of local police practices in the context of local community problems and local statutes. In the main such a responsibility can hardly be shifted from state courts conversant with the local scene to the United States Supreme Court . . . .

*Id.* at 327.

## APPENDIX A

## QUESTIONNAIRE

### I.

For each of the following statements, please indicate your opinion of the situation in your locality or area during the last five years using the following symbols:

++ Increased substantially
+ Increased a little
o Remained the same
− Decreased a little
−− Decreased Substantially
u Unknown

1. The number of cases in which trial judges have excluded evidence which they held was illegally seized has.....
2. The number of cases in which appellate courts have overturned convictions on the grounds that the evidence upon which the conviction was based was the produce of an illegal search has.....
3. The use of the defense of illegal search and seizure has.....
4. The effectiveness of law enforcement officers in obtaining legal evidence through search and seizure has.....
5. The number of "guilty" persons who ultimately go free because of illegally seized evidence has.....
6. Attempts on the part of police to adhere to the requirements of legal search and seizure has.....
7. Instruction and emphasis on the part of police departments toward educating their officers on the requirements of legal search and seizure have.....
8. The enthusiasm or morale of law enforcement officers in making searches and seizures has.....
9. The number of search warrants issued has.....

### II.

Please indicate your general attitude to the following statement using the following symbols:

++ Agree strongly
+ Agree, but not strongly
o Undecided
− Disagree, but not strongly
−− Disagree strongly

1. The exclusion of illegally seized evidence hinders effective law enforcement.....

2. The requirements of a legal search should be liberalized.....
3. The procedure for obtaining a valid warrant should be flexible.....
4. The definition of what constitutes a "legal search" should be broadened.....
5. Reliable evidence should be admitted in state courts whether or not it was legally obtained.....
6. The state courts should apply the same standards as the federal courts.....
7. Exclusion of evidence is an effective way of reducing the number of illegal searches.....
8. Civil and criminal proceedings against law enforcement officers should be the sole means of enforcing the requirements of legal search.....

Please circle the number of any item above to which you think your attitude has changed significantly during the last five years.

III.

Please answer "yes" or "no" to the following:

1. Did your state require the exclusion of illegally seized evidence from court proceedings prior to 1961?.....
2. Are general exploratory searches permitted in your state if predicated on a valid search warrant?.....
3. San search and seizure without a warrant be justified in your state if the evidence thus produced justifies a subsequent arrest?.....
4. Has there been any tendency by the courts in your state to broaden their definition of "legal search?".....

IV.

Please answer the following:

1. To your knowledge how many times have law enforcement officers in your state been subjected to civil proceedings or criminal prosecutions for committing illegal searches?.....
2. Would you advocate or willingly participate in such proceedings against law enforcement officers?.....

## APPENDIX B
### Response to questionnaire in Appendix A*

I.

| | Judges | | | | | Prosecution Officials | | | | | Defense Attorneys | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | ++ | + | −− | − | Unknown | ++ | + | −− | − | Unknown | ++ | + | −− | − | Unknown |
| 1. | 25 | 54 | 0 | 0 | 18 | 26 | 49 | 0 | 0 | 20 | 14 | 57 | 0 | 0 | 5 |
| 2. | 21 | 46 | 0 | 5 | 14 | 23 | 65 | 0 | 0 | 7 | 24 | 38 | 0 | 5 | 19 |
| 3. | 64 | 21 | 0 | 4 | 11 | 69 | 26 | 0 | 5 | 0 | 48 | 24 | 0 | 5 | 21 |
| 4. | 8 | 21 | 25 | 25 | 21 | 15 | 7 | 38 | 26 | 14 | 10 | 14 | 5 | 13 | 33 |
| 5. | 18 | 57 | 3 | 0 | 22 | 44 | 56 | 0 | 0 | 0 | 10 | 14 | 14 | 24 | 33 |
| 6. | 61 | 39 | 0 | 0 | 0 | 57 | 28 | 0 | 3 | 12 | 19 | 57 | 0 | 0 | 24 |
| 7. | 57 | 28 | 0 | 4 | 4 | 46 | 37 | 0 | 3 | 8 | 38 | 43 | 0 | 0 | 14 |
| 8. | 4 | 0 | 32 | 50 | 14 | 5 | 15 | 54 | 26 | 0 | 0 | 5 | 28 | 19 | 38 |
| 9. | 7 | 14 | 18 | 11 | 25 | 5 | 8 | 44 | 15 | 23 | 10 | 5 | 0 | 14 | 33 |

II.

| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. | 18 | 47 | 7 | 14 | 14 | 43 | 36 | 8 | 5 | 8 | 5 | 38 | 0 | 14 | 43 |
| 2. | 14 | 57 | 4 | 14 | 11 | 57 | 33 | 3 | 7 | 0 | 10 | 29 | 24 | 29 | 8 |
| 3. | 32 | 46 | 7 | 4 | 11 | 36 | 26 | 5 | 33 | 0 | 10 | 29 | 33 | 19 | 9 |
| 4. | 36 | 46 | 4 | 4 | 10 | 57 | 33 | 3 | 7 | 0 | 10 | 33 | 10 | 33 | 9 |
| 5. | 4 | 4 | 32 | 39 | 21 | 23 | 36 | 18 | 20 | 3 | 5 | 5 | 66 | 24 | 0 |
| 6. | 25 | 36 | 7 | 14 | 18 | 15 | 26 | 15 | 28 | 16 | 52 | 14 | 14 | 10 | 10 |
| 7. | 32 | 46 | 7 | 4 | 11 | 18 | 46 | 8 | 18 | 10 | 10 | 52 | 14 | 14 | 10 |
| 8. | 0 | 3 | 43 | 36 | 18 | 0 | 15 | 41 | 23 | 21 | 0 | 5 | 57 | 19 | 19 |

III.

| | Yes | No | Unknown | Yes | No | Unknown | Yes | No | Unknown |
|---|---|---|---|---|---|---|---|---|---|
| 1. | 64 | 18 | 18 | 64 | 34 | 2 | 62 | 29 | 9 |
| 2. | 32 | 50 | 19 | 20 | 75 | 5 | 29 | 52 | 19 |
| 3. | 18 | 57 | 25 | 20 | 77 | 3 | 14 | 76 | 10 |
| 4. | 21 | 58 | 21 | 10 | 82 | 8 | 14 | 62 | 24 |

IV.

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 1. | 7 | 93 | 0 | 2 | 98 | 0 | 10 | 90 | 0 |
| 2. | 21 | 64 | 15 | 23 | 69 | 8 | 38 | 48 | 14 |

*All figures are in percentages